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No. 81-87

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL EDWARD MOELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Reid v. *Georgia*, No. 36953 (Ga. Sup. Ct. Apr. 9, 1981), cert. denied, No. 81-180 (Oct. 5, 1981) 5

Sibron v. *New York*, 392 U.S. 40 5

Terry v. *Ohio*, 392 U.S. 1 5

United States v. *Berry*, 636 F. 2d 1075, rehearing en banc granted June 16, 1981 5

United States v. *Elmore*, 595 F. 2d 1036, cert. denied, 447 U.S. 910 5

United States v. *Mendenhall*, 446 U.S. 544 .... 4, 5

United States v. *Patino*, 649 F. 2d 724 5

United States v. *Setzer*, 654 F. 2d 354 5

United States v. *Wylie*, 569 F. 2d 62, cert. denied, 435 U.S. 944 5

Constitution and statute:

United States Constitution, Fourth Amendment 1, 5

21 U.S.C. 841(a)(1) 1

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Petitioner contends that his Fourth Amendment rights were violated in the course of an encounter with DEA agents at an airport.

After a jury-waived trial on stipulated facts in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment, to be followed by a three-year special parole term and fined $10,000. The court of appeals affirmed (Pet. App. A; 644 F. 2d 518).

1. The evidence adduced at an evidentiary hearing before a magistrate showed that DEA Agent Matheson, who was routinely watching flights arriving at the Atlanta airport from South Florida, observed petitioner deplane from a nonstop flight from West Palm Beach, Florida (Pet. App. 1c-2c). Petitioner was carrying only a small tote bag that appeared to be nearly empty. When petitioner showed his

ticket to the gate agent and requested directions to his connecting flight, Agent Matheson noticed that no baggage claim stubs were attached to the ticket envelope (*id.* at 2c). At Agent Matheson's request, the gate agent confirmed that no baggage claim stubs were attached to petitioner's ticket envelope and permitted Agent Matheson to examine the ticket. The ticket was for a one-way trip from West Palm Beach to Indianapolis, Indiana, via Atlanta, paid for in cash; a check of the airline reservation computer revealed that the reservation had been made at 3:56 a.m., three hours prior to departure of the flight, and that no local telephone contact number in West Palm Beach had been given (*id.* at 2c-3c).

Agent Matheson then approached petitioner while he was seated in a waiting area and, speaking in a low voice so as to avoid embarrassing petitioner, identified himself as a police officer and asked if petitioner would step outside the area and talk to him. Petitioner accompanied Agent Matheson to the fringe of the waiting area where Agent Matheson again identified himself as a police officer, displayed his credentials and asked if he could speak with petitioner, who agreed (Pet. App. 3c-4c). Agent Matheson asked petitioner for identification and to see his airline ticket. Petitioner, who appeared very nervous and whose hands were trembling, made no objection and handed the agent his ticket and his driver's license (*id.* at 4c). Agent Matheson asked about the purpose of the trip to West Palm Beach, and petitioner replied that he had visited relatives for a week; he added that the tote bag was his only luggage and that he had used his cousin's clothing while in Florida (*ibid.*).

At that point, Agent Matheson advised petitioner that he was a federal narcotics agent looking for drugs coming into the airport and asked petitioner if he was carrying any. When petitioner asserted that he was not, Agent Matheson asked if petitioner would consent to a brief search of his

person and tote bag. When petitioner said that he was not sure and asked what Agent Matheson wanted to do, the agent explained that the procedure would involve a pat down and a look in the bag. Petitioner then expressed concern about missing his flight, but Agent Matheson assured him that the search would take only five minutes, while petitioner's flight did not depart for 30 minutes. Petitioner then gave his consent and indicated, in response to Agent Matheson's inquiry, that he would prefer to be searched in a nearby private room rather than outside the public waiting area where they were standing. Petitioner maintained possession of his ticket, driver's license and tote bag as they walked to a nearby airline office (Pet. App. 5c).

As soon as they entered the office, before Matheson had an opportunity to advise petitioner of his right to refuse to consent to a search, in accordance with standard DEA practice, petitioner reached into his pocket and showed Matheson the contents of a small vial, stating that he was only carrying a little "speed" (Pet. App. 5c-6c). Petitioner admitted that the substance had not been prescribed by a physician. Agent Matheson recognized that the contents of the vial included several different kinds of controlled substances (*id.* at 6c). A quick search of the tote bag disclosed a plastic bag, which petitioner identified as "Manite I picked up for a friend." Agent Matheson knew that manite is a substance used to "cut" illegal drugs (*ibid.*). Agent Matheson then patted down petitioner's person and felt a hard substance that had the feel of a plastic bag. Petitioner was then placed under arrest and handcuffed. Agent Matheson then reached into petitioner's pants and removed a plastic bag that appeared to contain cocaine. A more thorough search of the tote bag was later conducted at the DEA office, which revealed more suspected cocaine concealed in a baby powder container, $1000 in cash, and an inhaler with its interior removed so that it could be used to transport

drugs; a lined yellow paper with notations of names and amounts of money was found in petitioner's pocket or wallet (*id.* at 6c-7c).

2. Petitioner's primary contention (Pet. 3-8) is that he did not consent to be searched. This contention is plainly insubstantial. The magistrate found the consent to be voluntary based on detailed findings of fact, concluding that "the conversations between [petitioner] and Agent Matheson were devoid of any hint of coercion or intimidation in seeking to obtain consent" (Pet. App. 11c). The district court also found that the consent was voluntary (*id.* at 6a), and the court of appeals held that the record "amply supports" this conclusion (*id.* at 7a). Petitioner advances no reason to disturb this factual conclusion of the courts below. Contrary to petitioner's contention (Pet. 5), the fact that he actually was carrying contraband does not render the search involuntary. See *United States* v. *Mendenhall*, 446 U.S. 544, 559 & n.7 (1980). And petitioner's statement before he consented that he was concerned about missing his flight (Pet. 4) meant nothing more than that he was concerned about missing his flight; it does not vitiate the subsequent consent. See *United States* v. *Mendenhall*, *supra*, 446 U.S. at 559. Indeed, the first contraband found by the agents was not the result of a search at all, but rather was voluntarily turned over by petitioner before the search took place. See Pet. App. 7a-8a.

3. Petitioner also contends (Pet. 8-10) that he was illegally seized when Agent Matheson first approached him in the waiting area and requested his identification. Both the magistrate (Pet. App. 7c-8c) and the court of appeals (*id.* at 7a) correctly concluded, however, that the approach by Agent Matheson was not a seizure within the meaning of the Fourth Amendment.

This Court has recognized that not every contact between a citizen and a police officer constitutes a seizure within the

meaning of the Fourth Amendment simply because a policeman can reasonably expect a citizen to stop when a question is posed to him. As explained in *United States* v. *Mendenhall, supra*, 446 U.S. at 553 (opinion of Stewart, J.), "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." See also *Terry* v. *Ohio*, 392 U.S. 1, 19 n.16 (1968); *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

The courts of appeals generally have agreed with Justices Stewart and Rehnquist (see *United States* v. *Mendenhall, supra*, 446 U.S. at 551-557) that a contact such as that in this case does not constitute a seizure. See *United States* v. *Setzer*, 654 F. 2d 354 (5th Cir. 1981); *United States* v. *Berry*, 636 F. 2d 1075 (5th Cir. 1981), rehearing en banc granted June 16, 1981; *United States* v. *Elmore*, 595 F. 2d 1036 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F. 2d 62, 66-68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). See also *Reid* v. *Georgia*, No. 36953 (Ga. Sup. Ct. Apr. 9, 1981), cert. denied, No. 81-180 (Oct. 5, 1981).[1] Petitioner points to no circumstances of his case that indicate any use of force or

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[1] In *United States* v. *Patino*, 649 F. 2d 724 (1981), the Ninth Circuit held an airport contact by a DEA agent to be a seizure, although it expressly recognized the principle that not all citizen-police contacts are seizures. *Patino* clearly does not conflict with the instant case. First, the *Patino* court relied (in our view incorrectly) on certain factors not present here. See 649 F. 2d at 727. Moreover, *Patino* affirmed a ruling by the district court, and the court expressly distinguished other cases, such as this one, where the defendant appealed from an adverse ruling of the district court. 649 F. 2d at 728-729 & n.4.

restraint on his movement so as to warrant a different result here, and the magistrate explicitly found that there were none.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

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[2]In addition, the magistrate noted that Agent Matheson arguably had reasonable suspicion sufficient to "stop" petitioner when he asked petitioner for his ticket (Pet. App. 9c). He also found that, assuming arguendo that petitioner had been illegally detained, his consent was sufficiently an act of his free will to vitiate the taint of the illegality (*id.* at 11c).

DOJ-1981-11